# RS & L Marine Sdn Bhd v Bras Ventures Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)–68–01 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
21 JUNE 2016

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*Contract — Formation — Concluded contract — Subcontract — Whether there was concluded and binding contract between parties — Whether there was certainty of contract price and terms of payment of contract price — Whether terms of payment of contract price was fundamental term of contract — Whether all fundamental elements of valid contract been established — Whether trial judge erred in his findings*

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When Bras Ventures Bhd ('the respondent') had tendered for the TNB project ('the project'), it had proposed to subcontract that part of the work on the project that involved the installation of pipes by horizontal directional drilling method ('the HDD works') to RS & L Marine Sdn Bhd ('the appellant'). On 20 September 2012, in a pre-award meeting held between the respondent and TNB it had been recorded that the respondent had appointed the appellant as its subcontractor in respect of the HDD works. The subcontract was to be based on the terms and conditions set out in the respondent's letter of intent dated 9 October 2012 ('the LOI') addressed to the appellant. The material contents of the LOI were the scope of work, the contract period and the contract price, which was for the sum of RM9.39m. The appellant did not indicate its confirmation to the proposed offer before 11 October 2012 as requested by Bras Ventures. Instead the appellant had further discussions with the respondent on the terms of payment of the contract price. In these discussions, the appellant had suggested that the respondent pay a deposit of 30% of the contract price upon mobilisation of works. Since the respondent was not agreeable to the payment of the 30% deposit as proposed by the appellant, the latter proposed a downward revision of the deposit payment from 30% to 5%. On 30 October 2012 TNB officially awarded a project to Bras Ventures Bhd ('the respondent'). The award document incorporated the minutes of the pre-award meeting held on 20 September 2012. However, after being awarded the project the respondent informed the appellant that it could not agree to the appellant's offer to carry out the HDD works. The respondent also informed TNB of its decision not to appoint the appellant as its subcontractor for the HDD works. The appellant filed a suit against the respondent and TNB. It was the appellant's case that the respondent had breached the subcontract when it instructed it to stop works after having appointed it as subcontractor for the HDD works. The appellant's claim was

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for specific performance of the subcontract or alternatively damages for breach of contract in lieu of specific performance. The trial judge found that the mere fact that a written agreement had yet to be drawn between the parties did not necessarily mean that there was a legally binding and enforceable agreement between them. Thus, the trial judge dismissed the appellant's claim with costs. Hence this appeal wherein the appellants contended that a valid contract had been concluded between the parties and that the unilateral termination of the agreement by the respondent amounted to a breach of contract. The appellant argued that there had been an acceptance of the offer and an agreement on the contract price and that the terms of payment of the contract price were merely incidental.

**Held**, dismissing the appeal with costs:

(1) The cases relied upon by the appellant, to support its contention that the terms of payment of the contract price was not a fundamental term of the bargain, could be distinguished from the present case. The factual matrix and legal issues involved in the case authorities were materially different from the facts and issues in the present case. As such, reliance on the authorities was misconceived. In the present case, no concluded contract had been reached between the parties as the terms of payment of the contract price had yet to be finalised and agreed upon. In short, no contractual relationship had existed between the parties (see paras 40–43).

(2) Further, the present appeal was more concerned with whether an agreement on terms of payment of the contract price, which was a vital term of the contract, had been reached. This was not the issue in the cases relied upon by the appellant (see paras 52–54).

(3) The minutes of the pre-award meeting had merely proved that the respondent had appointed the appellant as its subcontractor for the HDD works and nothing beyond that. It was not proof that all fundamental elements of a valid contract had been established. In the present case there was no consensus ad idem on the terms of payment of the contract price. As such, the trial judge had not erred in finding that no concluded contract had been reached between the appellants and the respondent (see paras 56 & 58).

**[Bahasa Malaysia summary**

Apabila Bras Ventures Bhd ('responden') telah menender untuk projek TNB ('projek'), ia mencadangkan subkontrak bahawa sebahagian kerja untuk projek yang melibatkan pemasangan paip dengan kaedah penggerudian berarah mendatar ('kerja HDD') kepada RS & L Marine Sdn Bhd ('perayu'). Pada 20 September 2012, dalam mesyuarat pra-award yang diadakan antara responden dan TNB ia telah merekodkan bahawa responden telah melantik

perayu sebagai subkontraktor berkaitan dengan kerja HDD. Subkontrak adalah berdasarkan terma dan syarat yang ditetapkan dalam surat hasrat responden bertarikh 9 Oktober 2012 ('LOI') yang dialamatkan kepada perayu. Kandungan material di dalam LOI adalah skop kerja, tempoh kontrak dan harga kontrak, yang mana untuk jumlah RM9.39 juta. Perayu tidak menyatakan pengesahannya kepada tawaran yang dicadangkan sebelum 11 Oktober 2012 seperti yang diminta oleh Bras Ventures. Sebaliknya perayu telah berbincang dengan lebih lanjut dengan responden berkaitan terma bayaran harga kontrak. Dalam perbincangan ini, perayu telah mencadangkan yang responden membayar deposit 30% harga kontrak apabila bermula mobilisasi kerja. Memandangkan responden tidak bersetuju dengan bayaran deposit 30% seperti yang dicadangkan oleh perayu, yang kemudian mencadangkan semakan menurun bayaran deposit daripada 30% to 5%. Pada 30 Oktober 2012 TNB secara rasmi mengawardkan satu projek kepada Bras Ventures ('responden'). Dokumen award mengandungi minit mesyuarat pra-award yang diadakan pada 20 September 2012. Walau bagaimanapun, selepas diawardkan projek itu responden memaklumkan kepada perayu bahawa ia tidak dapat bersetuju dengan tawaran perayu untuk menjalankan kerja HDD. Responden juga memaklumkan kepada TNB keputusannya untuk tidak melantik perayu sebagai subkontraktornya bagi kerja HDD. Perayu memfailkan tindakan terhadap responden dan TNB. Ia adalah kes perayu bahawa responden telah memungkiri subkontrak tersebut apabila ia mengarahkannya untuk berhenti kerja selepas melantiknya sebagai subkontraktor bagi kerja HDD. Tuntutan perayu adalah untuk pelaksanaan spesifik subkontrak atau secara alternatif ganti rugi untuk pelanggaran kontrak sebagai ganti pelaksanaan spesifik. Hakim perbicaraan mendapati bahawa fakta semata-mata bahawa satu perjanjian bertulis belum diputuskan lagi antara pihak tidak semestinya bermaksud terdapat satu ikatan sah dan perjanjian yang boleh dikuatkuasakan antara mereka. Oleh itu, hakim perbicaraan menolak tuntutan perayu dengan kos. Maka rayuan ini yang mana perayu menghujahkan bahawa satu kontrak sah telah dibuat antara pihak dan bahawa penamatan unilateral perjanjian oleh responden dikira sebagai pelanggaran kontrak. Perayu menghujahkan bahawa terdapat penerimaan tawaran dan persetujuan terhadap harga kontrak dan bahawa terma bayaran harga kontrak hanyalah sampingan.

**Diputuskan**, menolak rayuan dengan kos:

(1) Kes-kes yang disandarkan oleh perayu, untuk menyokong hujahannya bahawa terma bayaran harga kontrak bukanlah terma asas tawaran, boleh dibezakan daripada kes ini. Fakta matriks dan isu undang-undang yang terlibat dalam kes autoriti adalah berbeza secara material daripada fakta dan isu kes ini. Dengan demikian, pergantungan kepada autoriti adalah salah tanggap. Dalam kes ini, tiada kontrak yang terbentuk telah dicapai antara pihak kerana terma bayaran harga kontrak masih belum

muktamad dan dipersetujui. Ringkasnya, tiada hubungan kontrak wujud antara pihak (lihat perenggan 40–43).

(2) Selanjutnya, rayuan ini lebih berkaitan dengan sama ada satu perjanjian terma bayaran harga kontrak, yang mana adalah terma penting kontrak, telah dicapai. Ini bukanlah isu dalam kes yang dirujuk oleh perayu (lihat perenggan 52–54).

(3) Minit mesyuarat pra-award hanyalah membuktikan bahawa responden telah melantik perayu sebagai subkontraktornya untuk kerja HDD dan tidak melebihi itu. Itu bukanlah bukti bahawa semua elemen asas satu kontrak sah telah dibuktikan. Dalam kes ini tiada consensus as idem terhadap terma bayaran dan harga kontrak. Oleh itu, hakim perbicaraan tidak terkhilaf dalam dapatan bahawa tiada kontrak yang terbentuk telah dicapai antara perayu dan responden (lihat perenggan 56 & 58).]

**Notes**

For cases on concluded contract, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5069–5091.

**Cases referred to**

*Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, SC (refd)
*Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)
*Keppel Shipyard (Pte) Ltd v Monvia Motorship Corporation* [1980] 2 MLJ 169, CA (refd)
*Kollipara Sriramulu v T Aswathanarayana & Ors* 1968 AIR 1028, SC (refd)
*Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, FC (refd)
*Mahabuilders Bhd v Hotel Rasa Sayang Sdn Bhd* [2014] 10 MLJ 593; [2014] 3 CLJ 661, HC (refd)
*Malayan Flour Mills Bhd v Saw Eng Chee (administrator of the estate of Saw Cheng Chor, deceased) & Anor* [1997] 1 MLJ 763, HC (refd)
*O-Stable Panel Sdn Bhd lwn Kenmark Industrial Co (M) Bhd* [2010] 8 MLJ 686, HC (refd)
*R & G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd* [2015] OJ No 3844, SC (refd)
*Shoom Action Corp v Mart Shoom in Trust et al* 2003 OJ No 6180 (refd)
*Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors* [1992] 3 CLJ Rep 611, HC (refd)

**Appeal from:** Civil Suit No 22NCVC-161–02 of 2013 (High Court, Shah Alam)

*Malik Imtiaz Sarwar (Simon Hue Fook Chuan and Surendra Ananth with him) (Simon Hue & Assoc) for the appellant.*

*Lee Chan Leong (Siew Ee Mei with him) (Chan Leong & Co) for the respondent.*

**Abdul Rahman Sebli JCA:**

**[1]** The primary issue in this appeal is whether there was a concluded subcontract between the appellant and the first respondent, Bras Ventures Bhd ('Bras Ventures') and if so whether Bras Ventures had breached the subcontract. At the heart of the appeal lies the question of whether the mode of payment of the contract price constitutes a fundamental term of the agreement.

**[2]** The suit against the second respondent, Tenaga Nasional Bhd ('TNB') had been struck out on 14 May 2013 on the ground that the appellant had no reasonable cause of action against TNB. No appeal was filed against the striking out order. That explains why TNB is not a party to this appeal.

**[3]** It is the appellant's pleaded case that when Bras Ventures instructed them to stop works after having appointed them as subcontractor for the works, they had breached the subcontract, thereby causing them to suffer loss and damage, which loss and damage are continuing. As to how they have suffered loss and damage, the appellant says that upon being awarded the subcontract, they had taken the initiative to implement the works by doing some mobilisation works and had spent considerable time, effort and money on the works.

**[4]** The appellant's claim was for specific performance of the subcontract, alternatively or in addition to specific performance, damages for breach of contract in lieu of specific performance.

**[5]** At the conclusion of the trial, the learned trial judge dismissed the appellant's claim with costs, hence this appeal. We heard arguments from both sides and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

**[6]** The salient facts are these. The appellant is a company that specialises in the business of submarine cable installation, repair and maintenance and has the necessary experience and equipment to carry out the works, particularly the use of horizontal directional drilling ('HDD') equipment for use on land and at sea.

**[7]** Bras Ventures is a company that had tendered from TNB for a project known as 'Installation, Testing and Commissioning of 33KV Aluminium XLPE Single Core Underground Cables' for Bras Ventures' distribution ('the said project').

**[8]** When Bras Ventures was in the process of trying to procure the said project from TNB, they expressed a desire to award a portion of the project to the appellant as they lacked the necessary equipment and manpower to carry out the works themselves. That portion of the project was known as 'Kerja-Kerja HDD merentasi Sungai Manjung, Perak' ('the HDD works').

**[9]** For this purpose, Bras Ventures through their project manager Mr Ee Kian Yiaw ('Mr Ee') approached the appellant's managing director, Mr Hiew Heng Foo ('Mr Hiew') to enquire whether the appellant was agreeable to undertake the HDD works. The appellant agreed to undertake the works and issued a letter dated 29 May 2012 to Bras Ventures which contained a quotation. For convenience we shall refer to this letter as 'the first quotation'. It contained the following proposals:

(a) the contract price would be RM9.45m; and

(b) payment was to be made in two stages. The first payment amounting to 30% of the contract price was to be deposited with the appellant prior to the commencement of the HDD works and the remaining 70% was to be paid upon completion.

**[10]** Bras Ventures did not reject nor accept the first quotation. What they did was to negotiate with the appellant on the contract price and this resulted in a reduction of the contract price from RM9.45m to RM9.3m. An additional sum of RM90,000 was agreed for the additional work of cable pulling.

**[11]** The contract price was thus reduced from RM9.45m to RM9.3m. Both Mr Ee for Bras Ventures and Mr Hiew for the appellant placed their initials on the amendments to the first quotation. This handwritten variation to the contract price can be seen in the document at p 288 of *rekod rayuan (Bahagian C) (Jld 1/2)*. We shall refer to this document as 'the second quotation'.

**[12]** Two days later, ie on 31 May 2012 the appellant communicated this variation to the contract price by sending to Bras Ventures the second quotation.

**[13]** In a subsequent letter addressed to Bras Ventures dated 5 July 2012, the appellant 'confirmed' that the agreed contractual terms of the subcontract were as stipulated in the second quotation. This letter contained amongst others the following terms, which Bras Ventures claims were different from the first quotation:

(a) a deposit of RM3m was to be paid by Bras Ventures upon mobilisation of works (instead of RM2.79m, based on a RM9.3m x 30% computation);

(b) the date for payment of the balance of the purchase price was left open (instead of upon completion as stated in the first quotation); and

(c) the contract price did not include cable testing and commissioning (instead of cable installation).

**[14]** The letter was signed by the appellant but not by Bras Ventures. In fact Bras Ventures never responded to the letter and the space for their signature on the second page of the letter remained blank up to this day. This document can be seen at pp 289–290 of *rekod rayuan (Bahagian C) (Jld 1/2)*. There is no evidence as to what happened after the letter was sent to Bras Ventures.

**[15]** On 20 September 2012, a pre-award meeting was held between Bras Ventures and TNB. At this meeting, the managing director of Bras Ventures, Dato' Hj Ramle Nayan represented to TNB that they had appointed the appellant as their subcontractor for the HDD works. Mr Ee was present at the meeting. Item 14 para 2 of the minutes of meeting recorded as follows:

> Berdasarkan tender, Bras Ventures Bhd telah melantik RS & L Marine Sdn Bhd sebagai sub-kontraktor yang akan melaksanakan kerja-kerja HDD merentasi Sungai Manjung, Perak.

**[16]** Translated into English the minute reads:

> Based on the tender, Bras Ventures Bhd had appointed RS & L Marine Sdn Bhd as the subcontractor who will carry out the HDD works crossing Manjung River, Perak.

**[17]** Twenty days after the pre-award meeting, Bras Ventures by letter of intent dated 9 October 2012 informed the appellant that they had successfully secured the said project from TNB and proposed to offer the HDD works to the appellant on terms and conditions as set out in the letter of intent. The material contents of the letter of intent are as follows:

> We are pleased to inform your good selves that BRAS Ventures Bhd ('BVB') has successfully secured the above mentioned project from TNB. We propose to offer to RS & L Marine Sdn Bhd the above mentioned project based on the following details:
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> (a) The scope of work shall consist of supply, install and joint main steel pipe casing with minimum size of 600mm diameter & 6 nos 150mm+2 nos 100 mm (PN12.5) by horizontal directional drilling (HDD) method at the per meter rate of RM6,200 (Ringgit Malaysia Six Thousand Two Hundred Only);
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> (b) The scope of work shall also consist of cable pulling work at the per meter rate of RM60 (Ringgit Malaysia Sixty Only);

(c) The total contract price for the 1,500m length of work is thus for an amount of RM9.39m (Ringgit Malaysia Nine Million Three Hundred Ninety Thousand only) based on Bill of Quantities.

(d) The contract period for the works is one hundred eighty (180) days.

(e) The contract price shall include mobilisation, soil investigation, survey, geotechnical report, drawing and preparation of method statement.

Please indicate your confirmation to the above matter before 11th October 2012.

**[18]** It is to be noted that nothing was mentioned of the 30% deposit in the letter of intent and the appellant on their part did not indicate their confirmation to the proposed offer before 11 October 2012 as requested by Bras Ventures. What transpired after the issuance of this letter of intent was that further discussions were held between Bras Ventures and the appellant and the discussions centered on the terms of payment of the contract price.

**[19]** Bras Ventures made it known to the appellant that they were not agreeable to a deposit of 30% as proposed by the appellant in the first quotation. In other words there was no acceptance by Bras Ventures of the offer made by the appellant through the first quotation. The effect of this non-acceptance is that no contract had as yet been concluded between the parties: *Mahabuilders Bhd v Hotel Rasa Sayang Sdn Bhd* [2014] 10 MLJ 593; [2014] 3 CLJ 661, a decision of the High Court which had been affirmed by the Court of Appeal.

**[20]** The appellant apparently relented. By letter dated 17 October 2012, they proposed a downward revision of the deposit payment from 30% to 5%, and provided for further progress payments. The scope of work and the contract price however remained unchanged, ie RM9.39m, inclusive of the additional works. Bras Ventures did not indicate their acceptance to the proposed reduction in the deposit payment.

**[21]** On 30 October 2012, TNB officially awarded the said project to Bras Ventures. The award document incorporated the minutes of the pre-award meeting held on 20 September 2012 between Bras Ventures and TNB. This was provided in cl 2(iii) of the award which stipulated as follows:

> The parties agree that the Contract Agreement, this Letter of Acceptance, the signed minutes of the pre-award meeting dated 20 September 2012, the Letter of tender, the Condition of Contract, the Employer's Requirement and the tender shall be deemed to form and be read and construed as part of the Contract.

**[22]** However, to the appellant's dismay and in what they considered to be an about turn and a unilateral rescission of the subcontract, Bras Ventures by letter

dated 23 November 2012 informed them that they could not agree to their offer to carry out the HDD works. This was how Bras Ventures conveyed their intention not to proceed with the subcontract:

> The above mentioned and your propose quotation ref: RSL/915–10/2012 dated 17th October 2012 are referred.
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> We are regretful to inform your good selves that we could not agree to your offer to carry the above mentioned work and the payment term indicated in your letter mentioned above.
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> We sincerely believe that your good selves had provided your best offer and we are grateful for all the efforts made.

**[23]** The payment term that Bras Ventures mentioned in the second paragraph of the above letter can only refer to the mode of payment of the contract price, which obviously includes the deposit payment which the appellant had agreed to reduce from 30% to 5%.

**[24]** By letter of even date, Bras Ventures informed TNB of their decision not to appoint the appellant as their subcontractor for the HDD works. The reasons for the decision were given in paras 2 and 3 of the letter and they were as follows:

> Also, we would like to inform your good selves we have decided not to appoint RS&L Marine Sdn Bhd (RSL) as our HDD contractor for the HDD works crossing Manjung River. The decision was made after some thorough inspection and study carry out unto the commercial offer, technical capability and experienced (sic) possess (sic) by RSL.
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> Instead of getting a subcontractor to carry out the HDD work, we have decided to carry out the HDD works on our very own resources. The brand new 550 ton HDD machine will be manufactured by XuZhou Construction Machinery Group (XCMG) specifically for this project. Arrangement had also been made to have their team of engineers and technical staffs stationed on the site to monitor the implementation of the project. Besides that, we have also been invited to attend and study their on-going project in Changcun, Northeastern China. The project entails a crossing of frozen soil including rock. It goes as deep as 18 meter from the surface and span approximately 1000m in length that come with steel pipe measuring 813mm in Diameter.

**[25]** There were therefore four reasons proffered by Bras Ventures for the change of heart, namely:

(a) the commercial offer made by the appellant;

(b) the technical capability of the appellant to carry out the HDD works;

(c) the experience possessed by the appellant; and

(d) they would carry out the works themselves with the availability of the new HDD machine to be manufactured by XuZhou Construction Machinery Group ('XCMG').

**[26]** TNB it appears was not entirely happy with Bras Ventures' decision. This can be deduced from their letter to Bras Ventures dated 17 December 2012 in which they:

(a) stated that Bras Ventures had represented to them that the appellant had been appointed to carry out the HDD works;

(b) expressed their concern about Bras Ventures' carrying out the works themselves as this might have a negative impact on the said project; and

(c) requested Bras Ventures to furnish the contract between them and the appellant.

**[27]** This letter was copied to the appellant by TNB. By their solicitors' letter dated 3 January 2013, the appellant communicated to Bras Ventures that they did not accept Bras Ventures' unilateral termination of the contract. In paras 7 and 8 of the letter, this is what they told Bras Ventures:

> Take Notice that the mode of payment was never an issue on the part of our client as our client on the onset had indicated to your goodselves that they expected to be paid for the work done.
>
> We are also instructed by our client to inform you that our client does not accept your unilateral recession (sic) of the contract on the pretext of a dispute on the mode of payment.

**[28]** Bras Ventures' response was swift. By letter dated 4 January 2013, they asserted that there was never a firm and concluded contract between the parties. In paras 2 and 3 of the letter, Bras Ventures stated their position as follows:

> First and foremost, your client is factually wrong in trying to treat our letter dated 23 November 2012 as a unilateral termination. As a matter of fact, our said letter was brought about by your client's unjustified action in proposing and insisting on totally different terms of payment contrary to what your client has quoted at the very beginning. Such unjustified action was attempted at a critical timing with an obvious intention to try to arm-twist and take advantage on our Company.
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> As your client is fully aware, your client's proposed new terms of payment were not acceptable to our Company at all which subsequently resulted in the breaking down of the negotiation and finally led to the issuance of our letter dated 23 November 2012 aforesaid. In other words, the negotiation for the subcontract works that started and continued between your client and our Company had since come to an end.

**[29]** By another letter dated 9 January 2013, Bras Ventures made a further assertion that the parties had merely been negotiating and that the terms of payment of the contract price were never finalised. A

**[30]** Bras Ventures subsequently appointed two separate companies, namely Geo Map Survey Services and Gagasan Teguh Sdn Bhd to undertake the necessary works for the project. B

**[31]** The stop work order issued by Bras Ventures resulted in the abortion of all preliminary implementation of the soil investigation and hydrographic survey works that the appellant was supposed to carry out under the subcontract which, as pleaded, caused them loss and damage. C

**[32]** That basically is the chronology of events leading to the present action by the appellant. The sheet anchor of Bras Ventures' argument in opposing the appellant's claim is that the terms and mode of payment of the contract price had not been finalised, let alone agreed. They had made their stand clear in their letter of 4 January 2013 the contents of which we have reproduced in para 28 above. This is the bone of their contention and not the scope of work, nor the contract price. D E

**[33]** Bras Ventures' predicament was that despite having to comply with the time frame set by TNB for completing the works in the said project, yet the discussions and negotiations between them and the appellant failed to bring about any ultimate conclusion on the terms of payment of the contract price. F

**[34]** The law leans in favour of upholding bargains between the parties and not in striking them down. This is familiar jurisprudence and there is a long line of authorities for this trite proposition. If any authority is needed, the Federal Court decision in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 is the case on point. G

**[35]** The question in all cases of this nature is whether the parties have reached *consensus ad idem* on every fundamental term of the contract although they have yet to draw up and execute a formal agreement. What the fundamental terms of the contract are must depend on the kind of contractual relations the parties intend to enter into. For example, fundamental terms to constitute a contract of marriage may differ from fundamental terms to constitute a contract of service. The learned authors of *Chitty on Contracts* (26th Ed) Vol 1 have this to say on the main elements of a valid contract: H I

> The main elements of a valid contract are as follows. First, the parties must 'mean business': they must intend to enter into legal relations. For example, the acceptance of an invitation to dinner creates no obligation which the law will enforce. Secondly,

there must be an agreement, that is, a promise of which the offer has been duly accepted. Thirdly, either the promise must be contained in a deed under seal, or must be supported by consideration:

**[36]** Having considered the evidence both oral and documentary and the arguments of the parties, the learned trial judge came to the following findings of fact:

(a) the second quotation was not a contract and at best was only a starting point or platform for the parties to discuss and negotiate the terms and conditions before they entered into a formal contract. Although Mr Ee for Bras Ventures had initialed on the second quotation, he had no authority to approve the second quotation as he was merely a project manager and not a director of Bras Ventures;

(b) Bras Ventures never signed the 5 July 2012 letter to confirm their acceptance of the terms and conditions as per the second quotation and that if indeed there was already a concluded contract based on the second quotation, there was no necessity to send the 5 July 2012 letter;

(c) the appellant failed to give any confirmation to the letter of intent before 11 October 2012 as required by Bras Ventures and that if indeed a contract had already been concluded through the second quotation, why was no necessity to send another one through the 17 May 2012 letter; and

(d) the appellant was not entitled to rely on the pre-award meeting minutes to corroborate their position.

**[37]** In determining whether there was a binding contract between the parties, the learned trial judge correctly in our view referred to the following authorities for the proposition that the mere fact that a written agreement had yet to be drawn up and executed by the parties does not necessarily mean that there is no legally binding and enforceable agreement between the parties: *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors* [1992] 3 CLJ Rep 611; *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; *Malayan Flour Mills Bhd v Saw Eng Chee (administrator of the estate of Saw Cheng Chor, deceased) & Anor* [1997] 1 MLJ 763; *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39; and *Keppel Shipyard (Pte) Ltd v Monvia Motorship Corporation* [1980] 2 MLJ 169.

**[38]** The appellant's argument in support of their claim is speciously simple and straightforward — (1) they were offered the project; (2) there was acceptance of the offer; and (3) there was agreement on the contract price. Therefore a valid contract had been concluded. The terms of payment of the contract price were merely incidental.

**[39]** It was strenuously argued that when Mr Ee for Bras Ventures placed his initial on the amended contract price in the second quotation, there was already a valid and concluded contract between the parties and as such the unilateral termination of the agreement by Bras Ventures amounted to a breach of contract.

**[40]** As for the contention that the terms of payment of the contract price was not a fundamental term of the bargain, learned counsel for the appellant relied on the following authorities: *O-Stable Panel Sdn Bhd lwn Kenmark Industrial Co (M) Bhd* [2010] 8 MLJ 686, a decision of the Shah Alam High Court; *Kollipara Sriramulu v T Aswathanarayana & Ors* 1968 AIR 1028, a decision of the Supreme Court of India; and *R & G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd* [2015] OJ No 3844, a decision of the Canadian Superior Court of Justice.

**[41]** We have gone through the cases, and we must say, with due respect to learned counsel, that his reliance on these authorities is misconceived. First and foremost, the factual matrix of the cases and the legal issues involved were materially different from the facts and issues in the case before us although at first blush they appear to be directly on point.

**[42]** In *O-Stable Panel Sdn Bhd*, it is clear that the parties had reached *consensus ad idem* on all fundamental elements of the contract and a valid contract had in fact been concluded. The dispute over the mode of payment, variations to the design and some other additional works only arose during the course of executing the contract. The facts show that the plaintiff had done everything they needed to do in order to fulfill their part of the bargain.

**[43]** Clearly that is not the factual scenario in the appeal before us. In our case, no concluded contract had been reached between the parties as the terms of payment of the contract price had yet to be finalised and agreed upon. Further, there is no evidence that prior to Bras Ventures' letter dated 23 November 2012 referred to in para 22 above, the appellant had carried out any work. In short no contractual relationship had existed. The High Court case of *O-Stable Panel Sdn Bhd* is therefore of no relevance.

**[44]** As for the Indian case of *Kollipara Sriramulu*, the appellant relied on the following passage in the judgment of Ramaswami J who delivered the judgment of the court:

> In *Currimbhoy and Company Ltd v Creet 2* the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker J in *Hatzfeldt-Wildenberg v Alexander (3)* was applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a

> mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of respondent No 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed.

**[45]** What we can gather from the above passage is that two issues were raised for the court's determination and they were:

(1) whether the execution of a formal agreement was intended to be a condition of the bargain dated 6 July 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored; and

(2) whether, without any specific agreement on the mode of payment, the agreement became ineffective if otherwise the vital terms of the contract had been fixed.

**[46]** Juxtaposed to the facts of the case before us, the relevance of issue (1), which in our view does not favour the appellant, lies in the fact that the negotiation on the terms of payment of the contract price between Bras Ventures and the appellant was clearly with a view to executing a formal agreement and not 'a mere expression of the desire of the parties for a formal agreement which can be ignored'. This fact was acknowledged by the appellant themselves in their letter of 5 July 2012 where they made their stand clear as follows:

> Further, a Contract Agreement will be executed between both our companies to cover all the above of the project and will be signed prior to the commencement of project and immediately after the award of the said contract by TNB to Bras Ventures Bhd and subsequently RS&L Marine Sdn Bhd.

**[47]** Issue (2) is a mirror image of the issue before us in relation to the question of whether all vital terms of the contract had been fixed by the parties. In the context of the appeal before us, the question is whether the mode of payment of the contract price was a vital term of the agreement and if so whether it had been agreed by the parties.

**[48]** Our answer to the first part of the question is that on the facts of the present case, the mode of payment of the contract price was a vital element of

the bargain. Bras Ventures had made it clear to the appellant that they did not accept the terms of payment of the contract price as proposed by the appellant in the second quotation, in particular the term on deposit payment.

**[49]** Obviously therefore this deadlock must be resolved before the parties could reach *consensus ad idem* on the matter and a formal agreement drawn up and executed. Otherwise there will be uncertainty in the implementation of the contract and the parties will continue to haggle over the manner of payments after the contract document had been signed, sealed and delivered.

**[50]** This is probably the kind of situation that Gopal Sri Ram JCA (as he then was) had in mind when His Lordship said in *Charles Grenier*, 'Businessmen would find the law to be a huge loophole and commerce would come to a standstill'.

**[51]** With regard to the Canadian case of *R & G Draper Farms (Keswick) Ltd*, the question of law that confronted the court in that case was whether the terms of payment of a settlement agreement amounted to a fundamental term. The settlement agreement had been agreed to but the monthly amount to be paid was not. This was how ML Edwards J dealt with the issue at paras 30–33 of the judgment:

> In *Shoom Action Corp v Mart Shoom in Trust et al* 2003 OJ No 6180, Pitt J had to deal with a somewhat analogous situation where the dispute was about what the terms of payment were, if any agreed upon, as evidenced in an exchange of correspondence documenting terms of settlement. In *Shoom*, the parties had agreed on the price with respect to certain chairs. The only question was whether or not they agreed on the terms of payment.
>
> Fundamentally, the issue before Pitt J was whether or not he could imply terms of payment. Relying on a decision of the Ontario Court of Appeal in *Kay Corporation v Dekeyser* (1997) 76 DLR (3d) 588, Pitt J came to the conclusion in *Shoom* that where a contract was silent on the terms of payment the parties had negotiated and failed to agree on, the court could imply a reasonable term when the contract is silent.
>
> In all the circumstances before him, Pitt J came to the conclusion that there was an agreement reached between the parties and that the agreement was enforceable. The decision of Pitt J went to the Ontario Court of Appeal which came to the following conclusion:
>
> > Putting the appellant's position at its best Mr Sahi left the meeting on December 6th believing that the method of satisfying the settlement price had yet to be agreed upon, even though he never expressly raised that matter in the settlement meeting on December 6th. Despite this belief, neither Mr Sahi nor his counsel, acting upon Mr Sahi's instructions, made any response to the December 9th letter. As the motion's judge noted, Mr Davis would have had every reason to treat the lack of response as demonstrating an endorsement of his interpretation

of the agreement into which he understood they had entered. The argument that the parties had not agreed upon all essential terms of the agreement cannot succeed on the facts of this case.

**[52]** From the passages above it is clear that the central issue before the court was whether or not the court could imply reasonable terms of payment where the contract was silent on the terms of payment and the parties failed to reach an agreement. Clearly this issue is not germane to the issue before us in the present appeal.

**[53]** Here, we are not concerned with the question of whether reasonable terms of payment could be inferred where the contract is silent on the terms of payment but whether an agreement on the terms of payment of the contract price, which is a vital term of the contract, had actually been reached.

**[54]** In any event, even on the facts of *Shoom*, a case which ML Edwards J relied on in his judgment, the decision is distinguishable as in that case an agreement on the terms of payment had in fact been reached between the parties, unlike the case before us. It is important to appreciate this distinction because what the court had to determine in that case was whether or not the parties had agreed on the terms of payment, which is precisely the issue that confronts us in the present appeal. In the circumstances *R & G Draper Farms (Keswick) Ltd* is of no assistance to the appellant. In fact the decision goes against the grain of their argument.

**[55]** What of the appellant's contention that Bras Ventures had appointed the appellant as the subcontractor for the HDD works, as evidenced by the minutes of the pre-award meeting between Bras Ventures and TNB? The argument is that this is corroborative evidence of the fact that a valid contract by estoppel had been concluded when Mr Ee initialed the second quotation while holding himself out as acting for Bras Ventures.

**[56]** With due respect, we do not find anything of substance to the argument. Putting the appellant's case at its highest, the fact that Bras Ventures had informed TNB that they had appointed the appellant as the subcontractor for the HDD works merely proves that they had been appointed as the subcontractor and nothing beyond that. It is not proof that all fundamental elements of a valid contract had been established, in this case *consensus ad idem* on the terms of payment of the contract price.

**[57]** It is true that Mr Ee representing Bras Ventures had initialed on the second quotation, but this only relates to the amended contract price and not to the terms or mode of payment of the contract price, which were not even set out in the second quotation to at least reflect the appellant's agreement or

proposal to reduce the deposit payment from 30% to 5%.

**[58]** For all these reasons, we are inclined to agree with Bras Ventures that the learned trial judge had not erred in finding that no concluded subcontract had been reached between Bras Ventures and the appellant. In the circumstances the appeal is dismissed with costs.

*Appeal dismissed with costs.*

Reported by Kohila Nesan